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IN THE

# Supreme Court of the United States

OCTOBER TERM 1984

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NEWS PUBLISHING CO.,
d/b/a ROME NEWS TRIBUNE,
*Petitioner,*

vs.

BRONDON E. DEBERRY,
*Respondent.*

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**Petition for Writ of Certiorari to the Supreme Court of Georgia**

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## QUESTION PRESENTED

I. WHETHER, IN LIGHT OF *BOSE v. CONSUMER'S UNION*, THIS COURT SHOULD INDEPENDENTLY REVIEW THE EVIDENCE WHICH THE GEORGIA APPELLATE COURTS ERRONEOUSLY HELD TO SUPPORT A FINDING OF ACTUAL MALICE.

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* Pursuant to Supreme Court Rule 21.1(b) the following were parties to the proceedings below:

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## OPINIONS BELOW

The opinion of the Court of Appeals of the State of Georgia dated July 12, 1984 (as corrected July 27, 1984) is reproduced in its entirety in Appendix C. The opinion has not yet been published.

## JURISDICTIONAL STATEMENT

This libel case was tried in the Superior Court of Floyd County, Georgia. A jury awarded the Plaintiff $75,000 in compensatory damages.

Petitioner appealed the judgment to the Court of Appeals of the State of Georgia. The judgment was affirmed by said Court by an opinion dated July 12, 1984 (as corrected July 27, 1984). (Appendix C).

The Supreme Court of Georgia denied the newspaper's Petition for Certiorari on September 7, 1984. Petitioner's

Motion for Reconsideration was denied on October 1, 1984. (Appendix D).

Jurisdiction over this matter is conferred upon this Court by 28 U.S.C. § 1257(3) (1976).

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "

The Fourteenth Amendment to the United States Constitution provides in part:

> No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

This is a libel action brought by a public official concerning a newspaper article published in the *Rome News Tribune.* (App. A). At the time of publication, Respondent DeBerry was the deputy warden of the Floyd County Correctional Institution which was under investigation by the Georgia Department of Corrections. The jury awarded the plaintiff $75,000 in damages. The Court of Appeals of the State of Georgia affirmed. The Supreme Court of Georgia denied certiorari.

The complaint for libel is based entirely upon a quotation from an affidavit obtained by a Floyd County Commissioner and given to petitioner's reporter. The affidavit stated: "Mr. DeBerry upon seeing Mr. Knowles at the Institution stated that he, Mr. DeBerry, was going to kill Mr. Knowles or have it done." (App. 3a, 2b).

The undisputed evidence adduced at trial revealed the following facts. In 1978 the Department of Corrections for the

State of Georgia initiated an investigation into alleged wrongdoing at the Floyd County Correctional Institution. Floyd County Commissioner, Roy Knowles, notified reporter Nanette Payne that he had information indicating that the State's investigation had been incomplete and that persons with information had not been contacted by the State. Following the conversation with Commissioner Knowles, Wade Hoyt, his attorney, gave the reporter the affidavit of Larry Hight, a former inmate at the Floyd County Correctional Institution. (Appendix B) This affidavit was sworn before and notarized by Attorney Hoyt prior to his giving it to reporter Payne.

Prior to publication, reporter Payne received corroboration for statements in the affidavit from Commissioner Knowles who stated that the affidavit was true and based on his personal experience. With regard to the specific alleged wrong quotation from said affidavit, Commissioner Knowles indicated to the reporter that other people could confirm that Mr. DeBerry in fact made the statement attributed to him.

Larry Hight, the person who gave the affidavit which contained the language complained of by the Respondent, testified at trial that his affidavit was true and correct and that he had in fact heard DeBerry threaten Commissioner Knowles. Further, another withness, Mr. Donald Jones, took the stand and swore at the time of trial that he had heard Mr. DeBerry make the statement complained of.

Finally, at the trial, Commissioner Knowles stated under oath that he had given the reporter a great portion of the information contained in the November 12, 1978 article and that all the matter in said article was a true and correct report of information he collected and passed on to reporter Payne. After looking at the November 12, 1978 article, Mr. Knowles testified that the article correctly depicted the verbal and documented information he gave to the reporter.

In its review of the evidence, the Georgia Court of Appeals determined that the reporter's investigation was inadequate because she had failed to personally interview Mr. Hight, but relied instead upon his sworn affidavit.

The Court concluded:

> Failure to investigate further in these circumstances was sufficient evidence from which the jury could infer that recklessness in regard to truth or falsity which would demonstrate actual malice.

App. at 3c-4c.

## ARGUMENT

### IN LIGHT OF *BOSE v. CONSUMER'S UNION*, THIS COURT SHOULD INDEPENDENTLY REVIEW THE EVIDENCE WHICH THE GEORGIA APPELLATE COURTS ERRONEOUSLY HELD TO SUPPORT A FINDING OF ACTUAL MALICE.

### I. THIS COURT SHOULD INDEPENDENTLY REVIEW THE EVIDENCE OF ACTUAL MALICE.

Under the rule proclaimed by this Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Bose Corp. v. Consumer Union of the United States, Inc.*, ____ U.S. ____, 80 L. Ed.2d 502 (1984), appellate courts have a constitutional duty to independently review the evidence and measure it against the rigorous standards protecting the widest possible freedom of expression.

In *New York Times*, this Court held that appellate courts must make an "independent examination of the whole record" to determine whether plaintiff has produced sufficient evidence to meet the constitutionally required minimum standard for recovery:

> . . . [W]e must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." (Citation omitted.) In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the

> principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." (Citations omitted.) We must "make an independent examination of the whole record," (citation omitted) so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

*Id.*, at 284-86

The Court's duty to independently review the entire record under Constitutional rather than ordinary guidelines was strongly reaffirmed in this Court's opinion rendered April 30, 1984, in *Bose*. The issue in *Bose* was whether Rule 52(a), Fed. R. Civ. P., which provides that trial court findings of fact should not be set aside on appeal unless "clearly erroneous," would govern the standard for review of the District Court's finding of "actual malice."

In discussing the actual malice standard, this Court held again that appellate courts are constitutionally required to independently examine the evidence in First Amendment cases:

> For the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge.

____U.S.____, 80 L. Ed.2d at 516.

* * *

> Finally, the constitutional values protected by the rule make it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied.

80 L. Ed.2d at 517.

* * *

> . . . [T]he Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any

> unprotected category within acceptably narrow limits in an effort to insure that protected expression will not be inhibited.

80 L. Ed.2d at 519.

* * *

> The requirement of independent appellate review reiterated in *New York Times v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common law heritage. It reflects a deeply held conviction that judges—and particularly members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.

80 L. Ed.2d at 523.

Even in dissent, Justice Rehnquist expressed the view that independent appellate review was most appropriate in a case tried to a jury in a state court.

> The Court correctly points out that in *New York Times v. Sullivan, supra,* we conducted independent appellate review of the facts underlying the "actual malice" determination. It is notable, however, that *New York Times* came to this Court from a State court after a jury trial, and thus presented the strongest case for independent fact-finding by this Court

80 L. Ed.2d at 528, n.2.

The present appeal is precisely the type of case contemplated by Justice Rehnquist.

Petitioner respectfully requests this Court to exercise the mandate of *New York Times* and *Bose,* and conduct an independent review of the evidence in this Case. A review of the record clearly demonstrates that the Plaintiff has totally failed to establish by "clear and convincing evidence" that Defendant published the article with "actual malice."

## II THE RECORD IS TOTALLY LACKING IN CLEAR AND CONVINCING EVIDENCE OF RECKLESS DISREGARD FOR THE TRUTH OR KNOWLEDGE OF FALSITY AT THE TIME OF PUBLICATION.

A review of the evidence in the instant case conclusively shows that, even if the article at issue was false, the article was not published with that "high degree of awareness of . . . probable falsity" which is required to establish liability.

Plaintiff was required to prove by clear and convincing evidence that the authors knew the article was false or published with reckless disregard for whether it was true or false. *New York Times Co. v. Sullivan, supra.* There is no evidence that it was published with a "high degree of awareness of its probable falsity" or that the Defendants in fact entertained serious doubts as to truth as required by *St. Amant v. Thompson*, 390 U.S. 727 (1968). See Also, *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974); *Garrison v. Louisiana*, 379 U.S. 64 (1964). This Court summarized the meaning of "reckless disregard" in *St. Amant v. Thompson, supra*, as follows:

> "Reckless disregard," it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In *New York Times, supra*, the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), also decided before the decision of the Louisiana Supreme Court in this case, the opinion emphasized the necessity for a showing that a false publication was made with a "high degree of awareness of . . . probable falsity." 379 U.S. at 74. Mr. Justice Harlan's opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), stated that evidence of either deliberate falsification or

> reckless publication "despite the publisher's awareness of probable falsity" was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonable prudent man would have published, *or would have investigated before publishing.* There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice (emphasis added).

*Id.*, 390 U.S. at 730-31.

This Court's ruling in *St. Amant V. Thompson, supra,* identified the following evidence that may be employed to attempt to establish "actual malice":

1. The communication has been fabricated by the defendant;

2. It is the product of the defendant's imagination;

3. It is based wholly on an unverified anonymous telephone call;

4. It contains allegations that are so inherently improbable that only a reckless person would put them in circulation;

5. It is published despite obvious reasons to doubt the veracity of the informant upon whom the article is based or the accuracy of his reports.

It is undisputed that mere failure to investigate does not in itself establish "actual malice." *St. Amant, supra,* at 733. It is equally well settled that mistakes in interpreting events or documents do not evidence the necessary state of mind. *Time, Inv. v. Pape,* 401 U.S. 279 (1971); *Orr v. Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978), *cert. denied,* 440 U.S. 960 (1979). Publishing facts harmful to the plaintiff while not publishing others that were mitigating does not constitute actual malice. *Reliance Insurance Co. v. Barron's,* 442 F.Supp. 1341, 1352 (S.D.N.Y. 1977). It is similarly insufficient for a plaintiff to point to vituperation or exaggerated language. *Guthrie v. Annabel,* 50 Ill. App. 3d 969, 365 N.E. 2d 1367, 3 Media L.

Rep. (BNA) 1152 (1977); *Rose v. Koch*, 278 Minn. 235, 154 N.W. 2d 409 (1967). Such evidence does not indicate a publisher's lack of belief in the truth of his statements.

Investigative failures, if they do not in context indicate knowledge of falsity or subjective awareness of probable falsity, cannot themselves constitute "actual malice." *St. Amant v. Thompson, supra*, at 733. Defendants have been held to be free of "actual malice" despite a general failure to investigate, *Id.*, failure to talk to the plaintiff before publication,[1] failure to verify information,[2] publication of material incapable of verification,[3] failure to discover that published material relied upon had later been retracted,[4] and failure to discover contradictory material in the defendant's files but not at the time of publication actually known to the defendant's employees responsible for the particular publication.[5]

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[1] *Hurley v. Northwest Publications, Inc.*, 273 F.Supp. 967 (D. Minn. 1967), *aff'd*, 398 F.2d 346 (8th Cir. 1968); *Malerba v. Newsday, Inc.*, 64 A.D.2d 623, 406 N.Y.S.2d 552, 4 Media L. Rep. (BNA) 1110, (N.Y. App. Div. 1978).

[2] *Samborsky v. Hearst Corp.*, 2 Media L. Rep. (BNA) 1638 (D. Md. 1977); *Fadell v. Minneapolis Star and Tribune Co., Inc.*, 425 F.Supp. 1075, 2 Media Rep. (BNA) 1961 (N.D. Ind. 1976), *aff'd*, 557 F.2d 107, 2 Media L. Rep. 2198 (BNA) (7th Cir. 1977), *cert. denied*, 434 U.S. 966 (1977).

"While verification of the facts remains an important reporting standard, a reporter, without a high degree of awareness of their probable falsity', may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution by a public official." *New York Times Co. v. Connors*, 365 F.2d 567, 576 (5th Cir. 1966).

[3] *Hotchner v. Castillo-Puche*, 551 F.2d 910, 2 Media L. Rep. (BNA) 1545; (2d Cir. 1977), *cert. denied sub nom. Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977).

[4] *Alpine Construction Co. v. DeMaris*, 358 F.Supp. 422 (N.D. Ill. 1973).

[5] *New York Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964); *Trans World Accounts, Inc. v. Associated Press*, 425 F.Supp. 814, 2 Media L. Rep. (BNA) 1334, (N.D. Cal. 1977); *Pauling v. Nat'l. Review, Inc.*, 49 Misc. 2d 975, 269 N.Y.S.2d 11 (N.Y. Co. 1966), *aff'd*, 27 A.D. 903, 281 N.Y.S.2d 716 (1st Dep't 1967), *aff'd*, 22 N.Y.2d 818, 292 N.Y.S.2d 913, 239 N.E.2d 654 (1968).

The only evidence of a reckless or knowing state of mind cited by the court below is the defendant's failure to pursue further her investigation. The decisional authorities of this Court unequivocally hold that such evidence can never rise to the level of "clear and convincing" proof of reckless or knowing falsehood.

It is evident from the undisputed facts that the article was published as a result of charges by Commissioner Knowles (the public official charged with overseeing the conduct of the correctional institution), accusing Deputy Warden DeBerry of misconduct. Defendant was entitled to rely upon the statements of this responsible public official for the truth of the allegations against Mr. DeBerry. In addition, the newspaper had seen the sworn affidavit of former inmate Hight, (App. B) and had no reason whatever to doubt the veracity of his statements. Mr. Hight affirmed the truth of his affidavit in sworn testimony at trial below. Accordingly, there is no reason whatever to assume, as the Court below did, that further investigation would have led the newspaper to the conclusion that Hight was not telling the truth.

The opinion of the Georgia Court of Appeals relies exclusively on the newspaper's failure to investigate in determining that clear and convincing evidence of actual malice existed. The Court's opinion states:

> Before the article was published, no one connected with appellant's newspaper had seen Hight or talked with him either by telephone or in person. No one talked with anyone at the correctional institution or anyone else regarding Hight's reputation for reliability or truthfullness. No one checked Hight's criminal record. No one could remember any effort to ascertain from Knowles the names of the other individuals whom Knowles said could corroborate Hight's accusation. Payne and the appellant had no source other than Hight's affidavit and Knowles for the charge. Payne had no knowledge of when the threat was supposed to have been made.

> Thus, the evidence adduced provides clear and convincing evidence that obvious reasons existed for the appellant to doubt the veracity of the informant and the accuracy of his information.

App. at 3c.

The Court then concludes:

> *Failure to investigate further in these circumstances was sufficient evidence from which the jury could infer that recklessness in regard to truth or falsity* which would demonstrate actual malice. The trial court did not err in denying appellant's motions for directed verdict and j.n.o.v. (emphasis added).

App. at 3c-4c.

The conclusion reached by the court below is contrary to the rule enunciated in *St. Amant, supra*, and should be reversed by this Court.

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, *or would have investigated before publishing.* There must be sufficient evidence to permit the conclusion that defendant in fact entertained serious doubts as to the truth of his publication (emphasis added).

*St. Amant v. Thompson*, 390 U.S. 731. At the time of publication, the newspaper had absolutely no reason to doubt the truthfulness of Mr. Hight's affidavit, supported as it was by Commissioner Knowles.

The ruling of the Court of Appeals of the State of Georgia is so clearly contrary to the decisions of this Court that it cannot be permitted to stand.

Moreover, a reading of the *article itself* discloses that the defendant did not act with actual malice. It is clear from the text of the article that its purpose was to inform the public of certain questions that had been raised regarding the completeness and thoroughness of the State's investigation into managerial misconduct at the Floyd County Correctional Institution. It is obvious that the article was not designed to

represent any of the statements contained in the affidavits mentioned therein as being undisputed fact, but rather to simply point out that these statements had been made and sworn to by inmates and guards but had never been investigated. Regarding Mr. DeBerry, the November 12th article merely reported the existence of an affidavit by a correctional institute inmate (Hight) in which the inmate swore that DeBerry had ordered him to call Commissioner Knowles and ask Knowles to come to the facility so he (DeBerry) could refuse Knowles admittance. The article also reported that the inmate swore that he had overheard DeBerry say that he (DeBerry) was going to to "kill Knowles or have it done." Immediately after this portion of the article (which is the only part of the article regarding Mr. DeBerry) the article goes on to describe, in detail, DeBerry's version of this incident:

> "After State Corrections officials orally exonorated Rome C.I. officials of any wrongdoing at the facility, DeBerry in an interview with newsmen, said an inmate had 'lured Knowles' to the facility as part of a plot to 'harm' the Commisisoner, which is why Knowles was refused admittance to the facility by DeBerry."

At no place in the article is there any assertion or representation that the contents of the inmate's affidavit is undisputed fact. The existence of Mr. Hight's affidavit and its contents were reported only to point out that a former inmate who had made allegations about Mr. DeBerry and his conduct at the Correctional Institution had never been questioned by State investigators during the course of their investigation. The only thing reported in the article as an undisputed fact was the *existence* of the affidavit and the *failure* of the State's investigators to question the affiant, Mr. Hight. It is clear that the thrust of the article concerned the thoroughness (or lack of thoroughness) of the State's investigation. This is particularly obvious in light of the fact that the article also included Mr. DeBerry's version of the incident. The defendant simply published a news story which recites the fact that an inmate had made sworn statements about Mr. DeBerry's official conduct and that the inmate was never questioned about the statements by any of the State's

investigators. The Respondent cannot dispute the existence of the affidavit or the fact that the affidavit contained everything defendant's article reported that it contained. (Appendix B). This being the case, it is clear from reading the *article itself* that the defendant *coult not have acted* with the high degree of awareness of probable falsity required by the decisions of this Court.

From the foregoing, it is clear that the article, by its very nature, is "descriptive of what somebody *said*, not what somebody *did.*" *Time, Inc. v. Pape*, 401 U.S. 279, 286 (1971) (emphasis in original). As an accurate verbatim quotation of an affidavit in the custody of Commissioner Knowles, the article is constitutionally privileged and must be deemed to have been published without malice as a matter of law.

## CONCLUSION

For all the reasons stated above, we respectfully urge this Court to follow the mandate set forth in *Bose* and independently review the evidence on the issue of actual malice.

Respectfully submitted,

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# APPENDIX A

# At Floyd Correctional Institution

## Little evidence to show state probe was thorough

BY NANETTE PAYNE AND DAVID ROYAL
News-Tribune Staff Writers

If Floyd County Commissioner Roy Knowles wanted a complete and thorough investigation of the Correctional Institution (CI), there is little evidence to suggest he got one, according to documents and sworn affidavits obtained by the News-Tribune.

The probe report, given orally by state corrections officials, failed to take into account information obtained by the News-Tribune indicating that an inmate at the facility was transferred out simply because he was seen "talking to" Commissioner Knowles, that Knowles was "lured" to the CI by an inmate on instructions of Deputy Warden Brondon DeBerry then denied admittance, and that at least one CI guard Knowles requested the state to interview in the course of its investigation was not contacted about information he wished to disclose.

The correctional officer, Doug Johnson, River Creek Rt. 2, said in an affidavit he was ignored by state officials in the probe and claims to have information pertinent to the probe.

"I indicated to Mr. Knowles my willingness to discuss events at the Floyd County Correctional Institution with any representatives of the Georgia Department of Corrections. I feel I have information which might be relevant and helpful in said investigation.

"As of the date of this affidavit (Oct. 26, 1978) I have not been contacted by any representatives of the Department of Corrections including but not limited to Jack Kreps nor do I know of any other guards who discussed anything with representatives of the State Department of Corrections," his affidavit reads.

Johnson was recently suspended by the CI for 14 days for allegedly having work done on his private vehicle by inmates during off-work hours. He subsequently resigned.

**The state probe**

The state probe stemmed from some 50 allegations relayed by Knowles who said they came from inmates and guards at the facility. Knowles had requested the state officials probe the matter and then furnished a list of people he wanted the state to contact.

In addition to the list, Knowles said he orally asked the officials to contact Johnson and another guard, Sandy Quick, who has since been dismissed from the CI.

The state corrections officials have declined to tell News-Tribune reporters which of the allegations they probed, who they contacted in connection with it, or who even conducted the investigation with the exception of Kreps who said he and a co-worker were involved in the probe. Kreps is the district director for the Northern Division of the Department of Offender Rehabilitation.

The News-Tribune has been unable to contact Quick but did obtain Johnson's affidavit.

**Disciplinary action**

Johnson was suspended as disciplinary action for allegedly having prisoners work on his personal vehicle after regular hours despite the fact that only two days before his suspension, the September Term Floyd County Grand Jury said such work was not in violation of any state laws.

The suspension notification also charged that Johnson left the CI premises during working hours without permission.

The Grand Jury findings, however, was in apparent reference to reports published in the News-Tribune in June that then-acting Warden Robert Thacker had work performed on his personal vehicle by off-duty inmates.

Thacker was quoted at the time as saying that inmates would not be allowed to accept jobs from the public but personal work had been limited to only those employees who work in the vicinity of the CI and who are in contact with the inmates occassionally during the day.

**Knowles 'lured' to CI**

A former CI inmate, who requested his name be withheld for fear of reprisals, in a sworn affidavit obtained by the News-Tribune, said he was told by CI Deputy Warden Brondon DeBerry, to call Commissioner Knowles and ask him to come to the facility.

"I was told not to gvie my name to Mr. Knowles but simply ask him to come to the institution to talk to me about the problems at the institution.

"Mr. DeBerry told me that he wanted to get Mr. Knowles to the institution so he, Mr. DeBerry, could refuse Mr. Knowles entry into the institution," the former inmate's affidavit reads.

The inmate said at that time he knew of no plot to hurt Mr. Knowles by any of the inmates, nor had I even heard of such a plot by any of the inmates."

On that occasion, the inmate swears, "Mr. DeBerry, upon seeing Mr. Knowles at the institution, stated that he, Mr. DeBerry, was going to kill Mr. Knowles or have it done."

The inmate said he conveyed that information to Knowles and asked that the matter be investigated and "I know of other individuals, both prisoners and guards, who have also asked Mr. Knowles to investigate the Floyd County Correctional Institution.

As of the date (Oct. 26, 1978), I have not been contacted by any representatives of the Georgia State Department of Corrections nor of any Floyd County grand jury," the inmate avers.

After state corrections officials orally exonerated Rome CI officials of any wrong-doing at the facility, DeBerry, in an interview with newsmen, said an inmate had "lured" Knowles to the facility as part of a plot to "harm" the commissioner, which is why Knowles was refused admittance to the facility by DeBerry.

**Inmate transferred**

Included in documents turned over to the state corrections officials is the transfer and work records of a former CI inmate

whose discussions with Knowles at the facility prompted his transfer to a medium security prison from the minimum security CI according to official county records.

A Floyd CI Transfer Recommendation notes, "This inmate (Donald Jones) is from Floyd County and is closely associated with one of the county commissioners here. This commissioner comes over to the rock crusher where the inmate works on his detail and is constantly talking to the inmate, asking him questions about business pertaining to the Correctional Institution. This inmate has other inmates convinced that if they have any problems, instead of coming to the staff at the C.I., they can just come to him and he will get the commissioner to do something about it. We feel that it will be better for all concerned if the inmate we (sic) transferred to another institution as soon as possible."

When qestioned, Knowles said his only conversation with Jones involved a request by the inmate that Knowles write a letter to state corrections officials recommending an early parole for the prisoner.

Work records of Jones' obtained by the News-Tribune shows an exemplary inmate was transferred from the facility.

Jones received "excellent" ratings from CI superiors for the months of April, May and June (the transfer order was issued June 26), with recommendations for special privileges.

"This man continually works extra hours at the rock crusher on week nights and on the weekends whenver he is needed. Does a fine job . . . . He should be given a special privilege," his June performance report reads.

Knowles said the inmate requested the recommendation for early parole as he was apparently told that was what the state would need to grant such a release.

Included in documents taken to the state corrections officials by Knowles and Rome Attorney Ron Patton in August were letters from a CI inmate and a county employee alleging improprieties at the facility.

Allegations of prisoner harrassment and beatings are contained in the two letters given the state.

Rome News-Tribune

# APPENDIX B

GEORGIA, FLOYD COUNTY:

Now comes *LARRY HIGHT* before the below signed Notary Public and makes this Affidavit on his own personal knowledge and belief and for use in evidence in the continuing investigation of the Floyd County Correctional Institution:

1.

My name is *LARRY HIGHT* and I reside at 408 E. 9th St., *Rome, Georgia* and my occupation at this time is *construction worker.*

2.

I was a prisoner at the Floyd County Correctional Institution from March 13, 1978 to Sept. 4, 1978.

3.

I was told to call Roy Knowles by Bondon DeBerry, the Assistant Warden of the Floyd County Correctional Institution. I was told not to give my name to Mr. Knowles, but simply to ask him to come to the Institution to talk to me about the problems at the institution.

4.

Mr. DeBerry told me that he wanted to get Mr. Knowles to the institution so he, Mr. DeBerry, could refuse Mr. Knowles entry into the institution.

5.

At that time I knew of no plot to hurt Mr. Knowles by any of the inmates, nor had I even heard of such a plot by any of the inmates.

6.

I further state that on one occasion at the Floyd County Correctional Institution, Mr. DeBerry, upon seeing Mr. Knowles at the institution, stated that he, Mr. DeBerry, was going to kill Mr. Knowles or have it done.

7.

I conveyed the information contained herein to Mr. Roy Knowles and asked that he have these allegations investigated & I know of other individuals, both prisoners and guards, who have also asked Mr. Knowles to investigate the Floyd County Correctional Institute.

8.

As of this date, I have not been contacted by any representatives of the Ga. State Dept. of Corrections nor of any Floyd Co. Grand Jury.

9.

I certify I have read this affidavit & I affirm its contents this 26th day of Oct., 1978.

Sworn to and subscribed before the undersigned Notary Public this 26th day of October, 1978.

/s/ WADE C. HOYT, III

/s/ LARRY HIGHT

# APPENDIX C

JUL 12 1984

67725. NEWS PUBLISHING COMPANY d/b/a ROME NEWS TRIBUNE v. DeBERRY.

POPE, JUDGE. P-24

This appeal comes from a jury verdict in the amount of $75,000 in favor of plaintiff/appellee Brondon E. DeBerry against defendant/appellant News Publishing Company d/b/a Rome News Tribune in an action for libel. On November 12, 1978, the date the article in question was published, DeBerry was deputy warden of the Floyd County Correctional Institution. In the article, the thrust of which was that state investigations of wrongdoing at the correctional institution had not been thorough, the following statement appeared: "Mr. DeBerry, upon seeing Mr. Knowles at the institution stated that he, Mr. DeBerry, was going to kill Mr. Knowles or have it done." At the time of the article, Roy Knowles was a Floyd County commissioner. The statement was attributed in the article to an affidavit given by a former inmate of the correctional institution whose name was withheld for fear of reprisal.

1. Appellant argues that the trial court erred in not granting its motions for directed verdict and for judgment notwithstanding the verdict because DeBerry did not meet his constitutional burden of proof in regard to showing actual malice in the publication of the alleged libel. At the beginning of the trial, the parties stipulated that DeBerry was a public official and would have to prove actual malice in order to recover.

A civil action for libel by a public figure or official against a newspaper requires clear and convincing proof that a defamatory falsehood alleged as libel was published with actual malice; that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *Hemenway v. Blanchard*, 163 Ga. App. 668 (1) (294 SE2d 603); Curtis Publishing Co. v. Butts, 388 U.S. 130 (87 SC 1975, 18 LE2d 1094) (1967); New York Times v. Sullivan, 376 U.S. 254 (84 SC 710 11 LE2d 686) (1964). "This heavy burden of proof is necessary to preserve( ) the balance between free debate on

the one hand and compensation of individuals for harm inflicted by defamatory falsehood on the other.' [Cit.] Consistent with the strong societal interest in preserving free debate, an appellate court is required to examine the evidence with careful scrutiny. [Cits.]" *Hunt v. Liberty Lobby*, 720 F.2d 631, 643 (11th Cir. 1983). "Absent an admission by the defendant that he knew his material was false or that he doubted its truth, a public figure must rely upon circumstantial evidence to prove his case. [Cit.]" Id. "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." St. Amant v. Thompson, 390 U.S. 727, 731 (88 SC 1323, 20 LE2d 262) (1968). "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. . . . [R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Id. at 732. "[W]hen an article is not in the category of 'hot news,' that is, information that must be printed immediately or it will lose its newsworthy value, 'actual malice may be inferred when the investigation for a story. . . was grossly indadequate in the circumstances.' [Cits.]" Hunt v. Liberty Lobby, supra at 643.

At trial DeBerry testified that he never made any threat on Knowles' life and that the charge in the article printed in appellant's newspaper was false. He further adduced evidence showing the following. The former inmate referred to in the article was identified as Larry Hight. The article in which appeared the charge that DeBerry had threatened the life of Knowles was in preparation for several weeks and was prepared by two reporters. It was an investigative piece with no set time for publication; appellant's newspaper had reported earlier on the state investigations of the correctional institution. On at least two occasions Knowles had attempted to have the county commissioners remove DeBerry from office but had failed.

The principal reporter for the article in question was Nanette Payne. She testified that she first learned of the charge that DeBerry had threatened Knowles from Knowles himself who told her that he had heard it from other people. Knowles gave Payne Hight's name as one of the individuals who had knowledge of the threats. *Payne attempted to contact Hight by telephone at his job but could never reach him. She left several messages but her calls were never returned.* She knew where Hight worked (in the local area) but never went to his place of employment to talk to him. She did not know where he lived and made no concerted effort to find out. Her impression was that Hight was reluctant to talk to a reporter. She advised Knowles that she could not use the information unless it was substantiated. Knowles arranged for Hight to come to the office of the attorney who represented both Knowles and Hight to sign an affidavit.

Before the article was published, no one connected with appellant's newspaper had seen Hight or talked with him either by telephone or in person. No one talked with anyone at the correctional institution or anyone else regarding Hight's reputation for reliability or truthfulness. No one checked Hight's criminal record. No one could remember any effort to ascertain from Knowles the names of the other individuals whom Knowles said could corroborate Hight's accusation. Payne and the appeallant had no source other than Hight's affidavit and Knowles for the charge. Payne had no knowledge of when the threat was supposed to have been made. Payne never talked with DeBerry regarding the allegations prior to publication of the article.

Thus, the evidence adduced provides clear and convincing evidence that obvious reasons existed for the appellant to doubt the veracity of the informant and the accuracy of his information. Hight was all but anonymous to appellant and its reporters. The fact that Knowles had attempted to have DeBerry fired on two occasions should have put the appellant on notice that Knowles might have bias and would readily give credence to an alleged threat by DeBerry against him. Failure to investigate further in these circumstances was sufficient evidence from which the jury could infer that recklessness in regard to truth or falsity which would demonstrate actual

malice. The trial court did not err in denying appellant's motions for directed verdict and j.n.o.v.

2. Appellant argues that the court erred in admitted the opinion testimony of George Greiff, appellee's expert. Greiff was identified as a professor of journalism at Georgia State University with a 33-year career in newspaper reporting and editing. He testified to certain generally recognized minimum standards in journalism for the reporting of stories and then gave his opinion upon a hypothetical question. Appellant argues that there are no recognized journalistic standards and that Greiff's opinion invaded the province of the jury. We find neither argument persuasive. Greiff merely stated his opinion that the conduct described to him in the hypothetical question did not meet the standards to which he had earlier testified. He expressed no opinion whether the conduct so described would constitute actual malice. The court cautioned the jury before Greiff's testimony about expert testimony in general, and specifically cautioned the jury that Greiff's opinion would not be binding upon them. Therefore, we find no error in the admission of Greiff's testimony. See OCGA § 24-9-67; *Smith v. State,* 247 Ga. 612, 619 (277 SE2d 678) (1981); *King v. Browning,* 246 Ga. 46 (1) (268 SE2d 653) (1980); *Pembrook Management, Inc. v. Cossaboon,* 157 Ga. App. 675 (5) (278 SE2d 100) (1981).

3. Finally, appellant argues that the verdict must be reversed because the trial court incorrectly charged the jury that the burden of proof upon DeBerry was the preponderance of the evidence rather than the standard of clear and convincing proof required in libel cases involving public officials. In its initial charge to the jury, the court inadvertently gave both standards of proof to the jury; however, after this was pointed out by counsel, the court very clearly set out the proper standard in its recharge to the jury. " '(I)f it can be determined that the point at issue was presented in substantially . . . clear and understandable a manner . . . keeping in mind that a jury is a lay audience, there should be no reversal where the language conveys correctly the intent of the law and is so framed as to be applied with understanding to the fact situation.' [Cit.]" *Haynes v. Hoffman,* 164 Ga. App. 236, 237 (296 216) (1982). 216)(1982). An examination of the charge and recharge

shows that taken as a whole the law in regard to the proper burden of proof was amply set out. Nor do we find error in the court's refusal to submit to the jury the special verdict form requested by appellant. The subsmission of a special verdict is within the discretion of the trial court; absent an abuse of that discretion, the court's choice will not be overturned. See OCGA § 9-11-49; *Christiansen v. Robertson*, 139 Ga. App. 423 (5) (228 SE2d 350), revd. on other grounds, 237 Ga. 711 (229 SE2d 472)(1976).

*Judgment affirmed. Banke, P. J., and Benham, Jr., concur.*

# APPENDIX D

**Clerk's Office, Supreme Court of Georgia**

ATLANTA—Oct 1 1984

DEAR SIR:

The motion for a reconsideration was denied today:

Case No. 41463. *News Publishing Co.* d/b/a *Rome News Tribune v. De Berry*

Yours very truly,
MRS. JOLINE B. WILLIAMS,
Clerk